



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (NAIROBI LAW COURTS)**  
**Criminal Appeal 251 of 2007**

**DAVID LOWOI.....APPELLANT**

VERSUS

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

The Appellant was charged with Indecent Assault contrary to Section 144 (1) of the Penal Code. The Transition provision under the Act permits, continuity

The Appellant pleaded Not Guilty.

Complainant is a 6 year old female and the proceedings proceeded in Chambers. The charge sheet read that David Lawoi on 3<sup>rd</sup> day of September 2006 at Rongai township in Kanjiado District Rift Valley Province unlawfully and indecently assaulted J S by touching her private part namely virgina. All the same she gave evidence clearly a 7 year old child is not tender years. She said she attends church with her aunt and her mother.

The Evidence Act Section 124 demands corroboration when evidence is given by a child of tender years. There was corroboration from the mother who was nearby. The father was nearby also the appellant who was known as a church going person.

Moses Nuna PW3 he was in the shop run by PW2 when the Appellant was asking for a place to sit and wait for him. He heard PW1 saying "Stop that, that is bad manners" and that she would tell her mother. That is corroboration and the court addressed itself of warning of the danger of relying with evidence of young children. She was aware of priviso under Section 124 of Evidence Act which provides that in criminal cases involving sexual offences. If the only evidence is that of alleged victim the court shall receive the alleged victim evidence and proceed to convict.

The accused chose to make unsworn statement which was only emphasizing the prosecution's witnesses evidence. He placed himself on the scene. The society takes the sexual offences very seriously and has enacted law with serious punishment particularly in these days of HIV/Aids.

The sentence is prescribed 10 years imprisonment.

Regarding submissions the Trial Magistrate seems not to have complied with Section 200 Criminal Procedure Code Mrs Kasera RM and Mr. Karanja RM. Section 200 permits the Magistrate who has taken any evidence or written judgment to leave to another magistrate to read the judgment or to write judgment of evidence taken by another magistrate so long as the Appellant is notified to recall any witness who gave evidence earlier and the Appellant calls for him. The charge was under Section 144 (1) Penal Code. And the trial was finalized on 26/6/2006. By virtue of the transitional proceedings provisions any proceedings commenced under any written law or part thereof repealed shall continue to their logical conclusion under these

written laws.

Infringement of Section 72 (3) (b). The issue was not raised in the lower court and the prosecution was not given a chance to explain.

On issue of burden of proof the prosecution did not lay the burden of proof on the Appellant. There was no issue of penetration and therefore he was convicted on the alternative count of indecent assault by touch. It is to be noted that the complainant said he has done it before and on this night it is him who requested that the house be opened for him.

The conviction is upheld and sentence being the minimum cannot be reduced. The appeal is therefore dismissed.

Dated and delivered at Nairobi this 21<sup>st</sup> September 2010.

**J. N. KHAMINWA**

**JUDGE**